IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

ANDREW J. NICHOLS, W. W. SHENK, AND ANNIE B. ALGUIRE,
Petitioners,

v.

WALTER A. TODD, TRUSTEE, ET AL., *Respondents.*

BRIEF IN SUPPORT OF APPLICATION FOR PETITION OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit in the above entitled matter in the said Circuit Court of Appeals is contained on pages 87 through 93 of the Record and is reported in Volume 116 F. (2d) at page 979.

II.

Jurisdiction.

The date of the Judgment of the Circuit Court of Appeals is the 9th day of January, 1941. Petition for Rehearing was made and denied February 11, 1941 (R. 103). This Court has jurisdiction by virtue of Title 11 U. S. Code Section 48 (c) and by virtue of Title 28 U. S. C. A. Section 347, and also by virtue of Rule 38, 5 (b) of the Revised Rules of this Court.

III.

Statement of the Case.

The statement of the case is stated under heading No. I in the petition and in the interest of brevity the statement is not repeated at this point.

IV.

Specification of Errors.

1. The Court of Appeals erred in finding petitioners and others similarly situated are creditors and not owners and is in direct conflict with the same Court's ruling in another case involving the same subject matter, *Todd, Trustee* v. *Pettit, et al.*, reported in 108 F. (2d) 139.

2. The Court of Appeals erred in finding that the district court had ever obtained jurisdiction over the oil properties herein involved.

3. The Court of Appeals erred in finding that petitioners did not seriously deny they ever received notice pertaining to any of the proceedings incident to the bankruptcy matter of the debtor, Elliott, and is in direct conflict with the record.

4. The Court of Appeals erred when it said petitioners were guilty of laches.

5. The Court of Appeals erred when it sanctioned the district court's acts whereby petitioners' properties were sold or otherwise disposed.

6. The Court of Appeals erred in its decision whereby it sanctioned the denial of the right of notice to petitioners and others similarly situated in violation of provisions in the Bankruptcy Act.

7. The Court of Appeals erred when it said, "The eggs cannot be unscrambled . . ." in that the settling and adjudicating of rights is a fundamental function of the judiciary.

V.

Constitution, and Statutes Involved.

The Fifth Amendment to the Constitution of the United States. "No person shall . . . be deprived of . . . property without due process of law; . . ."

The Bankruptcy Act of 1898 as amended. Pertinent provisions are discussed elsewhere in the petition and this brief.

VI.

ARGUMENT.

Summary of Argument.

Elliott's interest in the oil and gas leases and royalties was an interest in real property and by virtue of the assignments he made, he conveyed interests in real property to petitioners and others similarly situated. Inasmuch as the debtor had assigned all the interest which he had in said properties, the district court had no jurisdiction over these properties in the debtor's bankruptcy matter.

The petitioners and others similarly situated can only be treated either as owners or creditors. The Court of Appeals held them to be creditors and yet sanctioned the acts of the district court from which petitioners had never received any notice, until the notice requiring the filing proof of claims.

The doctrine of laches cannot be applied when no notice had ever been given the petitioners, particularly when they acted within four or five months after receiving the first and only notice ever sent them. Further it is contended that laches can not apply where the court below never had jurisdiction.

Argument.

Under applicable local decisions of Texas it has been held that an undivided interest in an oil and gas lease is real property. *Waggoner Estate* v. *Sigler Oil Co.*, 19 S. W. (2d) 533; *Pantaze* v. *McDiel* (Civ. App.) 228 S. W. 962.

The record discloses that the debtor did assign all his interests to the various purchasers of the interest assignments (R. 69) and he had no interest in said real properties. Therefore having no interest in these properties, how then could the district court in a bankruptcy proceeding assume jurisdiction over such properties? It is well settled law that in a bankruptcy proceeding the court only has jurisdiction over property belonging to the debtor. Title 11, U. S. C. Chap. 2, Section 11 (7).

There are only two possible positions in which the petitioners and others similarly situated can be classified. They are either owners, which petitioners contend, or they are creditors which the courts below have held. (R. 91)

If petitioners and others similarly situated are owners, then the district court had no jurisdiction over their properties and having no jurisdiction the doctrine of laches cannot apply. *Detroit Trust Co.* v. *Dunitz*, 59 F. (2) 905.

If petitioners and others similarly situated are creditors then the court of appeals has sanctioned the failure of the district court to comply with provisions of Bankruptcy Act. 11 U. S. C. Section 94; Section 58 (a) 2, 3, and 4 of the Bankruptcy Act.

It is further respectfully contended that in either case the petitioners are not guilty of laches in that after receiving a notice pertaining to the bankruptcy proceedings, dated August 26, 1939 (R. 63) they did commence this action January 10, 1940 (R. 1) or a little more than four months from the date of the notice. Here it is pointed out to the Court that in the opinion of the Court of Appeals the court said, "Appellants claim the only notice which was ever sent them was dated June 14, 1939, directing them to file their claims with Glenn Smith, Referee." (R. 90) This statement is not in accordance with the Record in that the notice to file claims was dated August 26, 1939 (R. 63) and was pursuant to an Order of Court dated July 14, 1939. (R. 61)

Petitioners respectfully call the Court's attention to the case of *Todd, Trustee* v. *Pettit, et al.*, 108 F. (2) 139, decided December 14, 1939 by the same Court of Appeals. In that case pertaining to this same subject matter and involving the same oil and gas properties herein involved, the

court there said: ". . . Though these oil properties stood in the name of Elliott, (the debtor) the bill states he did not own them, but the two groups of unit holders did. . . . It is argued that a bankruptcy Trustee takes title to all property to which the bankrupt has title, even though it appears it be held in trust. Though this be true, when it appears that the bankrupt is only a trustee and has no beneficial interest in or claim against the property, the court ought to turn it over to its true owners where possible. . . . *The unit holders are not by virtue of their certificates creditors of Elliott. They are the equitable owners of these trust properties.* . . . " (Italics ours)

CONCLUSION.

From a consideration of the foregoing matters, it appears, first, that the decision in the instant case is in conflict with decisions in other Circuit Courts of Appeal, which conflict should be resolved by the United States Supreme Court; second, that the decision in the instant case is in direct conflict with a former decision of the same Court of Appeals involving the same subject matter; third, that in the instant case there has been an utter disregard of applicable sections under the Bankruptcy Act; and lastly, the fundamental right under the Fifth Amendment to the United States Constitution has been violated by the taking of property belonging to petitioners and others similarly situated without due process of law.

Wherefore, petitioners respectfully submit that the writ of certiorari prayed for should be granted.

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